FILED BY CLERK
JUN 15 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOHN MICHAEL ROSSI, Appellant.	2 CA-CR 2010-0163 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093010001

Honorable John S. Leonardo, Judge
Honorable Richard S. Fields, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 Following a jury trial, appellant John Rossi was convicted of aggravated driving with an alcohol concentration (AC) greater than .08 and aggravated driving while under the influence of an intoxicant and impaired to the slightest degree, both while his license was suspended, revoked, or restricted. The trial court suspended the imposition of sentence, placed him on three years' probation, and ordered him to serve mandatory, concurrent, four-month prison terms as a condition of probation. On appeal, Rossi argues the trial court erred by denying his motion to suppress evidence without an evidentiary hearing, by denying his motion to exclude certain evidence, and by refusing to give a *Willits*[1] instruction. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts adduced at trial in the light most favorable to upholding the verdict. *State v. Blakley*, 226 Ariz. 25, ¶ 2, 243 P.3d 628, 629 (App. 2010). A sheriff's deputy saw a shirtless male driving a truck at a high rate of speed from a no-parking area. The deputy turned his car around, followed the truck, and signaled for it to pull over. When the truck stopped, John Rossi, the person the deputy had seen driving the truck, was sitting in the driver's seat. Rossi got out of the vehicle and showed signs of impairment. The deputy administered the horizontal gaze nystagmus (HGN) test and detected six out of six cues of impairment. He then arrested Rossi. Because Rossi refused to submit to a blood test, the deputy obtained a search warrant and drew a sample of Rossi's blood. His AC subsequently was determined to be .114.

[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

¶3 Before trial, Rossi filed a motion to suppress all the evidence against him, claiming his detention and arrest had been unlawful. The trial court denied the motion without a hearing. Rossi was then tried, convicted, and sentenced as described above. This appeal followed.

Motion to Suppress

Evidentiary Hearing

¶4 Rossi argues the trial court erred by failing to grant an evidentiary hearing on his motion to suppress. But Rossi did not request an evidentiary hearing or object below when the court ruled based on the deputy's statement of probable cause in the interim complaint without first conducting an evidentiary hearing. Failing to object, Rossi did not bring any alleged error to the attention of the court, which would have given it the opportunity to correct any error, and he therefore has forfeited the right to relief for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object waives all but fundamental, prejudicial error); *see also State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy"). Fundamental error is that "'going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show both that the error was fundamental and that it caused him prejudice. *Id.* ¶¶ 19-20.

¶5 First, Rossi must show the trial court erred.[2] *See id.* Because "the court may set any motion for hearing," Ariz. R. Crim. P. 35.2, it is within the court's discretion whether to grant a hearing. *See* Ariz. R. Crim. P. 35.2 cmt. (rule "intended to give the court maximum discretion in deciding what procedures . . . will be most helpful to it"). *Cf.* Ariz. R. Crim. P. 16.3(d) ("parties may submit any issue to the court for decision on the basis of stipulated evidence"). The purpose of a hearing is to resolve disputed facts and, in the absence of disputed facts, no hearing is required. *State v. Downes*, 528 P.2d 110, 113 (Or. Ct. App. 1974), *cited in State v. Riley*, 196 Ariz. 40, ¶ 8, 992 P.2d 1135, 1139 (App. 1999). *Cf. United States v. Hines*, 628 F.3d 101, 105 (3d Cir. 2010) ("To require a hearing, a suppression motion must raise 'issues of fact material to the resolution of the defendant's constitutional claim.'"), *quoting United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996); *State v. Eastlack*, 180 Ariz. 243, 255, 883 P.2d 999, 1011 (1994) ("Judges are required to grant a hearing only when a defendant's [Rule 10.1] motion alleges facts which, if taken as true, would entitle the defendant to relief. We will not require presiding judges to hold meaningless hearings when no grounds for relief are stated in the first instance.").

¶6 Rossi's motion to suppress included only a few, cursory facts, which the state did not dispute. Furthermore, Rossi cites no law supporting his argument that the trial court abused its discretion by refusing to grant an evidentiary hearing on his motion

[2]Because Rossi does not argue the lack of the hearing constituted fundamental error, we could consider this issue waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). However, in our discretion, we choose not to do so and address it.

to suppress. We conclude the court did not err, fundamentally or otherwise, in failing to conduct a hearing sua sponte. *See Downes*, 528 P.2d at 113. *Cf. State v. Nilsen*, 134 Ariz. 433, 435-36, 657 P.2d 421, 423-24 (App. 1982) (no error refusing to grant evidentiary hearing on "due process defense" when court "carefully reviewed appellants' offers of proof and arguments"), *aff'd as modified*, 134 Ariz. 431, 657 P.2d 419 (1983).

Suppression of Evidence

¶7 Rossi also argues the trial court erred in denying his motion to suppress on the merits, contending first the state did not sustain its burden of showing the stop was reasonable. "We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion." *State v. Cruz*, 218 Ariz. 149, ¶ 47, 181 P.3d 196, 208 (2008).

¶8 Rule 16.2(b), Ariz. R. Crim. P., governs burdens of proof on motions to suppress evidence. It provides that when a defendant is entitled to disclosure of the circumstances under which evidence was taken, including evidence obtained by search or seizure, the defendant has the burden of establishing a prima facie case that the evidence should be suppressed. Ariz. R. Crim. P. 16.2(b); *see State v. Hyde*, 186 Ariz. 252, 265-66, 921 P.2d 655, 668-69 (1996). If the defendant meets this "burden of going forward," the state must then satisfy its burden of persuasion by a preponderance of the evidence in order to avoid suppression. Ariz. R. Crim. P. 16.2(b); *Hyde*, 186 Ariz. at 266, 921 P.2d at 669.

¶9 To establish a prima facie case that the evidence should be suppressed, a defendant must offer some evidence rather than relying only on argument or legal theory. *State v. Fimbres*, 152 Ariz. 440, 442, 733 P.2d 637, 639 (App. 1986). Such evidence

may include "[a]mong other things, sworn affidavits, stipulated facts, depositions, and oral testimony." *Id.* at 441, 733 P.2d at 638, *quoting State v. Grounds*, 128 Ariz. 14, 15, 623 P.2d 803, 804 (1981). Here, although the trial court did not hold a hearing, Rossi was still required at least to allege some facts which, if found true, would entitle him to suppression of the evidence. *See Rodriguez v. Arellano*, 194 Ariz. 211, ¶ 7, 979 P.2d 539, 541-42 (App. 1999).

¶10 Rossi was entitled to and did receive full disclosure concerning the events surrounding his stop. He, therefore, had the burden of showing a prima facie case that the initial stop of the vehicle was unreasonable.[3] *See* Ariz. R. Crim. P. 16.2(b). A traffic stop is unreasonable if it is not based on reasonable suspicion. *State v. Starr*, 222 Ariz. 65, ¶¶ 10-12, 213 P.3d 214, 217-18 (App. 2009).

¶11 Rossi's motion did not allege any facts showing or even suggesting the initial stop was unreasonable. Rather, in a conclusory fashion, he simply stated in his motion that the stop was unconstitutional. Thus, Rossi did not sustain his burden of presenting a prima facie case that the traffic stop was unreasonable. *See Fimbres*, 152 Ariz. at 442, 733 P.2d at 639; *see also Hyde*, 186 Ariz. at 266, 921 P.2d at 669 ("[F]ailure

[3]To the extent Rossi asserts that a traffic stop requires probable cause based on language from *Whren v. United States*, 517 U.S. 806 (1996), we previously have decided that because the Supreme Court was reviewing a trial court's use of probable cause for a traffic stop and because "cases both before and after *Whren* have applied a 'reasonable suspicion' standard," the Fourth Amendment continues to require only reasonable suspicion for traffic stops. *State v. Starr*, 222 Ariz. 65, ¶¶ 10-12, 213 P.3d 214, 217-18 (App. 2009).

to meet the burden of going forward results in an adverse ruling before presentation of evidence by the party with the burden of persuasion.").

¶12 Relying on *Rodriguez*, Rossi argues that, in the absence of a warrant, the burden shifts to the state to show the traffic stop was legal. 194 Ariz. 211, 979 P.2d 539. Traffic stops constitute seizures under the Fourth Amendment. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). However, because traffic stops are less intrusive, an officer need have only a reasonable suspicion that criminal activity has occurred or is occurring rather than the probable cause required for a warrant. *Id.* Thus, a traffic stop does not require a warrant or warrant exception as required for a search. *See id.*; *see also State v. Childress*, 222 Ariz. 334, ¶ 19, 214 P.3d 422, 428 (App. 2009) (warrant not required for investigative stop with reasonable suspicion). We conclude the holding in *Rodriguez* does not aid Rossi in establishing a prima facie case for the suppression of evidence from the traffic stop.

¶13 Rossi further argues the trial court erred because his later arrest was not based on probable cause. A defendant who establishes the evidence was obtained by a warrantless arrest has established a prima facie case as required by Rule 16.2(b). *See Rodriguez*, 194 Ariz. 211, ¶ 12, 979 P.2d at 542-43 ("defendant who establishes that evidence was seized pursuant to a warrantless search has satisfied the burden of going forward"); *see also Hyde*, 186 Ariz. at 268, 921 P.2d at 671 (in context of burdens of proof in motions to suppress "[t]he difference between a search warrant and an arrest warrant is irrelevant").

¶14 Because Rossi established he was arrested without a warrant, he established a prima facie case as required under Rule 16.2(b). *See Rodriguez*, 194 Ariz. 211, ¶ 12, 979 P.2d at 542-43. In deciding the motion, the trial court considered the sworn statement of the arresting deputy in the interim complaint as required for an arrest without a warrant under Rule 4.1(b), Ariz. R. Crim. P. In that statement, the deputy avowed that when Rossi pulled over onto a private driveway, he had driven off the driveway and almost off a four-foot drop. The deputy further noted that Rossi had a difficult time turning off the truck, had about him a "strong odor of intoxicants," exhibited slurred speech, had red, watery, bloodshot eyes, was unable to divide his attention, had an argumentative attitude, swayed as he balanced, and staggered as he walked. When the deputy conducted the HGN test, he observed six out of six indicators of impairment. Given this evidence, the court did not err in finding the state had met its burden of showing that the officer had probable cause to arrest Rossi and in denying Rossi's motion. *See State v. Superior Court*, 149 Ariz. 269, 271, 276, 718 P.2d 171, 173, 178 (1986) (slight swerving while driving, smell of alcohol on breath, appearance, and HGN test sufficient probable cause despite "fair performance" on other sobriety tests).

¶15 Rossi contends, however, that "the [c]omplaint was not part of the record in this motion." But it was part of the superior court record and is part of ours. Rossi has not cited any authority that the trial court erred by reviewing its own file. We cannot find that the court erred in denying Rossi's motion to suppress.

Rule 403, Arizona Rules of Evidence

¶16 Rossi also argues the trial court erred by denying his motion to suppress evidence of alcoholic beverages found in the truck because the evidence was unduly prejudicial under Rule 403, Ariz. R. Evid.[4] "We review the trial court's rulings on the admissibility of . . . evidence for abuse of discretion." *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

¶17 Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. And relevant evidence generally is admissible, Ariz. R. Evid. 402, subject to limitations such as the ones contained in Rule 403, Ariz. R. Evid. That rule permits a court to exclude relevant evidence if, among other criteria, its unfair prejudicial effect substantially outweighs its probative value. But, although relevant evidence generally will adversely affect the party against whom it is offered, Rule 403 is meant only to preclude evidence that "has an

[4]Rossi appears to argue that evidence of the alcoholic beverages was improper other acts evidence governed by Rule 404(b), Ariz. R. Evid. However, he did not present this argument to the trial court and, thus, has not preserved it for review. *See State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy"). Rossi has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Furthermore, because he does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶18 As Rossi concedes, the presence of opened and unopened containers of alcoholic beverages in the truck did have some tendency to make it more likely that he was driving while under the influence of alcohol, especially because the truck was driving away from a location where it may have been parked. And it is unclear what emotion this evidence would cause in the jury that would not be caused by Rossi's AC or other signs of intoxication. We find no error in its admission.

¶19 Moreover, we will not reverse a conviction if the error was harmless. *State v. Green*, 200 Ariz. 496, ¶ 21, 29 P.3d 271, 276 (2001). The criminalist testified that Rossi's AC was .114. This and the evidence recited above provide overwhelming proof that Rossi was under the influence of alcohol while driving and impaired to the slightest degree. Given this quantum of evidence, even if the trial court had erred by admitting evidence of the containers of alcoholic beverages, any error would be harmless. *See id.*

Requested *Willits* Instruction

¶20 Rossi further argues the trial court erred by denying his request for a *Willits* instruction because "the state negligently failed to retain the truck in light of the fact that [the owner] would likely not make [it] available." He contends that, without being able to submit this evidence to the jury, he could not adequately present his defense that he had not been driving but, rather, had switched seats with his friend at the last minute. We review for an abuse of discretion a trial court's refusal to give a *Willits* instruction. *Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93.

¶21 "A *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant." *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990). In order to merit a *Willits* instruction, a defendant must show: (1) "the state failed to preserve material evidence that was accessible and might tend to exonerate him" and (2) the failure to preserve the evidence resulted in prejudice to the defendant. *Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93. "Evidence must possess exculpatory value that is apparent before it is destroyed." *State v. Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d 127, 133 (App. 2002).

¶22 First, Rossi has not shown that the truck's allegedly exculpatory value was apparent at the time it was returned to its owner. And Rossi did not request that the sheriff's department hold the vehicle as evidence.

¶23 Furthermore, despite the absence of the truck at trial, several pictures of the truck were admitted into evidence. One of these pictures shows the front seats of the truck, and another shows part of the back seat area. As Rossi notes, none of the pictures shows the space between the top of the front seat and the ceiling of the truck. However, Rossi's witnesses were free to testify about the dimensions of the truck. And the deputy described the inside of the truck, explaining that each of the front seats was a large, "tall-backed" "captain chair." Finally, the average person, including jurors, has some familiarity with the inside of a truck.

¶24 In light of this evidence, additional pictures of the inside of the truck would not have had any exculpatory value. Therefore, Rossi was not prejudiced by the absence of the truck or the lack of additional pictures to show the jury. The trial court did not

abuse its discretion by refusing to give a *Willits* instruction. *See Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93.

Conclusion

¶25 For the foregoing reasons, we affirm Rossi's convictions and terms of probation.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge